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December 20, 2012

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Re: *Grunstein v. Silva*
C.A. No. 3932-VCN
Date Submitted: December 14, 2012

Dear Counsel:

This letter addresses issues regarding trial exhibits that were not resolved during the teleconference on December 14, 2012.¹

One category of exhibits² is sponsored by Defendants and consists of documents related to other proceedings involving Mr. Grunstein. Mr. Grunstein's statements in those proceedings are admissions by him. The exhibits also properly

¹ The transcript of that teleconference shall serve as the Court's order for the questions they answered.

² JX 842, 845, 854, 855, 872, 881, 882, 885-893, and 895-897 (the "Disputed Exhibits").

demonstrate that litigation involving a similar or related health care transaction has resulted. The documents, however, may not be considered to show what is alleged to be Mr. Grunstein's proclivity to deviate from the truth. This Court is charged with resolving questions of fact in this matter. What amounts to specific instances of witness conduct or, more broadly, the witness's character or reputation, which might be divined from this collection of exhibits, would not assist the Court in that function.³

Moreover, these exhibits may not be used substantively with respect to Mr. Dwyer or CFG. Neither of these parties was involved in the proceedings that generated these exhibits. Accordingly, the Disputed Exhibits are admitted only for the limited purposes described herein; otherwise, these exhibits are excluded.

Defendants also seek the admission into evidence of Beverly Enterprises Inc.'s Definitive Proxy Statement (the "Proxy Statement") (JX 1061). Plaintiffs have objected on grounds of hearsay. As the Court ruled at trial, to the extent that

³ See D.R.E. 404, 405 & 608. The parties also dispute whether the former testimony exception to the hearsay rule under D.R.E. 804(b)(1) would apply to the testimony of witnesses in other proceedings involving Mr. Grunstein. This testimony is inadmissible hearsay and does not qualify under the former testimony exception because Mr. Grunstein did not have a similar motive to cross-examine these witnesses with respect to the unique facts and claims present in this case.

Defendants seek to use the Proxy Statement to prove the truth of the matters contained therein, it would be hearsay.⁴ This is consistent with the analysis in *In re Santa Fe Pacific Corporation Shareholder Litigation*.⁵ There, the Supreme Court noted that “[i]f the Joint Proxy were relied upon for the truth of the matters contained therein, it would be hearsay with respect to claims other than the disclosure claims.”⁶ It also cited other cases for the proposition that a registration statement, a prospectus, and a form 10-K are hearsay with respect to the truth of matters asserted therein.⁷ However, the Supreme Court observed that in *Hal Roach Studios, Inc.*, the Ninth Circuit sustained the trial court’s determination that a registration statement was admissible under the residual exception to the hearsay rule.⁸ Under D.R.E. 807, a statement may qualify under the residual exception if it has “circumstantial guarantees of trustworthiness” and the court determines that:

⁴ Trial Tr. vol. 6, 1526, Dec. 3, 2012.

⁵ 669 A.2d 59, 70 (Del. 1995).

⁶ *Id.*

⁷ See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1552–53 (9th Cir. 1990); *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F.Supp. 1049, 1068–69 (W.D.Mo. 1985).

⁸ *Hal Roach Studios, Inc.*, 896 F.2d at 1552.

(A) The statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.⁹

As an initial matter, a proxy statement may have circumstantial guarantees of trustworthiness because of the manner in which it was prepared, used, and filed.

The Ninth Circuit expressed the same view regarding a registration statement:

Although it is true that securities lawyers have been found on occasion to publish false information in Registration Statements, there is no reason to believe that the Registration Statement at issue in this case contains false statements as to the corporate history of Hal Roach. The standard of due diligence applied by securities lawyers with regard to Registration Statements is sufficient to guarantee the requisite circumstantial trustworthiness of the facts contained in the Registration Statement to allow the district court to admit the evidence pursuant to Rule 803(24).¹⁰

Similarly, a proxy statement reporting Beverly's acquisition history would have substantially the same likelihood of being accurate.

⁹ D.R.E. 807. The rule also provides, in part: "a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant."

¹⁰ *Hal Roach Studios, Inc.*, 896 F.2d at 1552.

Here, Defendants seek to draw statements from the Proxy Statement relating to the acquisition history of Beverly. Those statements are offered as evidence of material facts, namely how the transaction unfolded. The Proxy Statement is, perhaps, more probative on this point than testimony that might have been obtained years later by deposing the bankers and lawyers involved in the Beverly transaction because it was written, roughly, contemporaneously with the events leading up to the acquisition and was affirmed by various Beverly officers.¹¹ Although the drafting of the Proxy Statement may have been influenced by Mr. Silva and his entities, who had taken effective control of the Beverly acquisition by the time the Proxy Statement was prepared, this fact goes to the weight of that evidence, not its admissibility. Finally, to the extent that the Proxy Statement provides an additional, neutral perspective on the Beverly acquisition history from a party to that transaction which is not a party to this proceeding, the Court notes that the interests of justice would be served.¹²

¹¹ The Proxy Statement is from early 2006, more than six years before trial.

¹² The Plaintiffs have not raised the notice issues set forth in the final sentence of D.R.E. 807. *See supra* note 9.

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Accordingly, the Proxy Statement is admitted.¹³

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

¹³ Because the Court has concluded that the Proxy Statement is admitted under the residual exception to the hearsay rule, it need not address Defendants' argument that the business records exception provides a basis for admitting the Proxy Statement.